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No. 626

# In the Supreme Court of the United States

OCTOBER TERM 1966

WALKER DISTRIBUTING COMPANY,
*Petitioner,*

vs.

LUCKY LAGER BREWING COMPANY,
*Respondent.*

## Brief of Respondent Lucky Lager Brewing Company in Opposition to Petition for Writ of Certiorari

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WALKER DISTRIBUTING COMPANY,
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*Respondent.*

## Brief of Respondent Lucky Lager Brewing Company in Opposition to Petition for Writ of Certiorari

### OPINIONS BELOW

The order of the District Court granting respondent's motion for summary judgment (R. 82-83; attached to this brief as Appendix 1) and the judgment entered thereon (R. 84-85; Appendix B to Petition) are not reported. The opinion of the Court of Appeals (R. 106-107; Appendix A to Petition) is not yet printed in the official reports but will be reported in the Federal Reporter, Second Series, Volume ....., page .....

## JURISDICTION

Jurisdiction is invoked under United States Code, Title 28, Section 1254(1).

## STATUTES INVOLVED

This petition involves Section 1 of the Sherman Act (15 U.S.C. Sec. 1) which, in relevant part, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

## QUESTION PRESENTED

Did the trial court and the Court of Appeals correctly hold that the pleadings, depositions and answers to interrogatories on file showed that there was no genuine issue as to any material fact and that respondent was entitled to judgment under Section 1 of the Sherman Act.

## STATEMENT OF THE CASE

Petitioner is a distributor of beer, including at one time beer manufactured by respondent. Respondent terminated petitioner's distributorship in 1960 and subsequently filed suit for sums due on open account with respect to beer sold to petitioner and not paid for. Petitioner counterclaimed, alleging breach of contract.

The trial court entered summary judgment for respondent on the complaint and dismissed petitioner's counterclaim. Petitioner filed an amended counterclaim, adding claims under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act (15 U.S.C. Sec. 14). The amended counterclaim was dismissed and petitioner then filed its second amended counterclaim. Respondent again moved to

dismiss and upon the granting of the motion, petitioner caused judgment to be entered and appealed to the Court of Appeals. That court affirmed the judgment except with respect to the claim under Section 1 of the Sherman Act. (323 F.2d 1, 3 (1963))

After remand, petitioner and respondent completed discovery. Respondent then moved for summary judgment on the remaining count of the second amended counterclaim. (R. 73) The trial court granted the motion, after having given petitioner leave to file affidavits or make any other showing in opposition to the motion. No affidavits or further showing were offered by petitioner. (R. 82-83) The Court of Appeals affirmed and this petition followed.

## ARGUMENT

This case presents no important question of federal law, no conflict with the decisions of this Court or of other courts of appeal, and no considerations calling for the granting of a writ of certiorari. The court below was clearly correct in rejecting petitioner's attempt to avoid payment of its debt by resorting to the antitrust laws. Respondent's termination of petitioner's distributorship agreement was a purely unilateral act, devoid of any implications of conspiracy or combination, and wholly lacking in any price-fixing, tying or other antitrust ramifications.

This case involves no agreements—let alone combinations or conspiracies—of any kind. Petitioner makes no serious effort to contend otherwise. Petitioner's contention, in a nutshell, is simply that respondent's unilateral termination of petitioner's distributorship when petitioner insisted on retaining the distributorship for another beer was coercive and thus illegal.

The question presented here is whether there was a triable issue below under Section 1. Petitioner's contention raises none. In fact, the petition contains not a single record reference or other suggestion of such an issue. Although petitioner has had six years, including two trips to the Court of Appeals, to make its record and formulate its contentions, it has utterly failed to make a showing of a Section 1 case.

**The Trial Court and the Court of Appeals Correctly Held That Petitioner Presented No Triable Issue Under Section 1**

The claim asserted by petitioner is an alleged violation of Section 1. Thus the question is whether it has made out a triable issue as to the existence of a contract, combination or conspiracy prohibited by Section 1. Without a showing of facts from which a trier of fact can find such a contract, combination or conspiracy, petitioner has no case.

Petitioner advanced no such facts below and it advances none here. Its petition does not argue that any contract, combination or conspiracy existed, and it refers to no record facts which would tend to establish one.

In fact, petitioner completely misconceives the nature of Section 1. This is illustrated by its characterization of *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), on which it relies:

> "One of the newer aspects in the law which was established in the *Parke-Davis* case was a prohibition against coercive dealing." (Petition p. 5)

Petitioner fails to realize that what Section 1 prohibits are certain contracts, combinations or conspiracies. It prohibits them when voluntarily made and it prohibits them when adherence is coerced. *Parke, Davis* outlawed not pressure by a manufacturer to compel a retailer's adherence to

its policies but the *combination* of the manufacturer and its wholesalers to enforce these policies. See 362 U.S. at pp. 37, 44; and see, *Dart Drug Corp. v. Parke, Davis & Company,* 221 F.Supp. 948, 949-950 (D.D.C. 1963), affirmed, 344 F.2d 173, 186 (D.C. Cir. 1965). Nothing of the sort is claimed in this case.[1]

Petitioner's reliance on the other cases cited is equally inapposite. *Klor's, Inc. v. Broadway-Hale Stores,* 359 U.S. 207 (1959), outlawed *group boycotts* and expressly distinguished "a case of a single trader refusing to deal with another, . . . [or] even of a manufacturer and a dealer agreeing to an exclusive distributorship." 359 U.S. at p. 212.[2]

*United States v. Richfield Oil Corp.,* 99 F.Supp. 280 (S.D. Cal. 1951), affirmed, 343 U.S. 922 (1952), involved the legality of a comprehensive system of requirements and tying *agreements* covering all of Richfield's dealers in the Western United States. This court affirmed per curiam on the authority of *Standard Oil Co. v. United States,* 337 U.S. 293 (1949), which was decided under Section 3 of the Clayton Act, not Section 1 of the Sherman Act.

*Simpson v. Union Oil Co.,* 377 U.S. 13 (1964), held that consignment *agreements* between the company and its dealers constituted illegal price fixing agreements.

*Osborn v. Sinclair Refining Co.,* 286 F.2d 832 (4th Cir. 1960) and 324 F.2d 566 (4th Cir. 1963), outlawed tying *agreements* requiring Sinclair dealers to buy Goodyear TBA.

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1. The most that could be said of petitioner's case is that it is an attack on respondent's replacement of petitioner by appointing a new distributor for the territory. This states no claim under Section 1. *Ace Beer Distributors, Inc. v. Kohn,* 318 F.2d 283 (6th Cir. 1963), cert. denied, 375 U.S. 922 (1963).

2. This is the most that petitioner's unsupported reference to two distributors who allegedly agreed to give up Coors to get additional territory from respondent amounts to.

*Englander Motors, Inc. v. Ford Motor Co.*, 267 F.2d 11 (6th Cir. 1959), was an attack on a system of exclusive dealing *contracts* between Ford and all of its dealers under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. The trial court's dismissal of the complaint was reversed with only a passing reference to Section 1.

*George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787 (2nd Cir. 1960), held that the allegations of the complaint sufficiently alleged the existence of illegal resale price maintenance *agreements*.

None of the cited cases, nor any others, support petitioner's proposition that Section 1 prohibits a manufacturer from terminating a distributor who refuses to give up handling an incompatible product, in the absence of a combination or conspiracy for this purpose.[3] That this is not the law was made abundantly clear to petitioner on its first appeal when the Court of Appeals said

> ". . . section 1 does not outlaw all restraints of trade, but only a 'contract, combination . . . or conspiracy, in restraint of trade.'" (323 F.2d at p. 7)

Petitioner's persistence in ignoring the language of Section 1 demonstrates its inability to make a case under it.

The substance of petitioner's argument is that Section 1 prohibits a manufacturer from unilaterally terminating a distributor who insists on carrying a competing product. This case is wholly free from any price-fixing ramifications. See Fulda, Individual Refusals to Deal: When Does Single —Firm Conduct Become Vertical Restraint?, 30 Law and Contemp. Prob. 590, 597-599 (1965). Petitioner concedes,

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3. This Court only recently denied certiorari in a case in which the petitioner made the same argument, alleging that a manufacturer violated Section 1 by coercing him to take on a product he did not want. *Fabert Motors, Inc. v. Ford Motor Co.*, 355 F.2d 888 (7th Cir. 1966), cert. denied, 384 U.S. 939 (May 16, 1966).

moreover, that respondent's agreements with its distributors contained no prohibition against handling competing products (Petition pp. 3, 7). The decision on the prior appeal that petitioner had no claim for violation of the exclusive dealing prohibition of Section 3 of the Clayton Act is final and the law of the case. 323 F.2d at pp. 9-10. If an agreement "does not fall within the broader proscription of § 3 of the Clayton Act, it follows that it is not forbidden by those of [Sections 1 or 2 of the Sherman Act]." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 335 (1961).[4] This petition presents the a fortiori case, no agreement being claimed or having existed. Petitioner's effort to convert the non-existence of an agreement, which, if it existed, would be lawful, into a Section 1 violation may be ingenious but is wholly lacking in merit.

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4. The Court of Appeals also correctly held that there was no evidence on the basis of which "unreasonableness" of any restraint effected could have been found. See, *Susser v. Carvel Corporation*, 332 F.2d 505, 516 (2nd Cir. 1964), cert. dismissed, 381 U.S. 125 (1965); *Schwing Motor Co. v. Hudson Sales Corp.*, 239 F.2d 176 (4th Cir. 1956), cert. denied, 355 U.S. 823 (1957).

## CONCLUSION

For the reasons stated, the decision below was correct. It announces no new or important principles of law and creates no conflict with any decisions of this Court or of other circuits. Accordingly, the petition for a writ of certiorari should be denied.

Dated at San Francisco, California, October 14, 1966.

Respectfully submitted,

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(Appendix Follows)

## *Appendix 1*

*In the United States District Court for the District of Idaho, Southern Division*

No. 3632

Lucky Lager Brewing Company, a California corporation,
*Plaintiff and Counter-defendant,*

vs.

Walker Distributing Company, Inc., an Idaho corporation, T. G. Walker, also known as Tom G. Walker, and Rose Walker,
*Defendants and Counter-Claimants,*

vs.

W. A. Godfrey and Delbert Provant,
*Counter-defendants.*

### ORDER

This matter is presently before the Court on the motion of the plaintiff and counter-defendant Lucky Lager Brewing Company for a Summary Judgment dismissing Count Two of the Second Amended Counterclaim of defendant Walker Distributing Company, Inc.

Counsel for the respective parties submitted briefs and thereafter on September 18, 1964, the Court heard oral argument on said motion, W. E. Sullivan, Esq. and William M. Schwarzer, Esq. appearing for plaintiff and counter-defendant, and Lloyd J. Walker, Esq. appearing for defendant and counter-claimant. At the conclusion of the oral argument counsel for defendant and counter-claimant requested and was given thirty days within which to present

and file affidavits or make any other showing he desired in opposition to the showing made in support of the motion. The record discloses that since said hearing, no filings of affidavits or any showing has been made by defendant and counter-claimant and that no request has been made for additional time within which to make such filings or showing. In light of the record the Court must conclude that defendant and counter-claimant does not intend or desire to make any such filings or showing.

After fully considering the records and files, the briefs and argument of counsel, it is the opinion of this Court that the motion of plaintiff and counter-defendant for a Summary Judgment should be granted.

Accordingly, It is Ordered that said motion be and the same hereby is granted.

Counsel for plaintiff and counter-defendant shall prepare a proposed judgment, serve a copy of the same on counsel for defendant and counter-claimant, and submit the original to the Court.

Dated this 10th day of November, 1964.

FRED M. TAYLOR
Fred M. Taylor
*United States District Judge*